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PP v. SAMSUL ARIFIN BAKAR

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
ZABARIAH MOHD YUSOF JCA
RAVINTHRAN PARAMAGURU JCA
B [CRIMINAL APPEAL NO: A-06B-84-11-2018]
11 NOVEMBER 2019

***CRIMINAL PROCEDURE**: Acquittal and discharge – Appeal against – Appeal by prosecution – Accused charged with offence of self-administration and consumption*
C *of dangerous drugs – Traces of drugs found in urine – Accused acquitted and discharged without being called to enter defence – Police officer gave accused one bottle only and dipped strips in urine sample during preliminary test – Whether procedure for urine sample collection complied with – Whether two bottles ought to be used for urine collection – Whether urine sample contaminated – Whether*
D *necessary steps taken to request medical officer to take urine sample – Whether prima facie case established – Whether accused ought to be called to enter defence – Dangerous Drugs Act 1952, ss. 15 & 31A(1A)*

***CRIMINAL LAW:** Dangerous Drugs Act 1952 – Section 15 – Self-administration and consumption of dangerous drugs – Traces of drugs found in accused's urine –*
E *Procedure for urine sample collection – Whether complied with – Police officer gave accused one bottle only and dipped strips in urine sample during preliminary test – Whether two bottles ought to be used for urine collection – Whether urine sample contaminated – Whether necessary steps taken to request medical officer to take urine sample – Whether s. 31A(1A) of Dangerous Drugs Act 1952 complied with*
F *– Whether prima facie case established*

The respondent was arrested and brought to the police station where his urine sample was collected. Only one bottle was used and a preliminary test, carried out by dipping test strips into the urine sample, showed the presence of amphetamine and methamphetamine. Subsequent analysis by a
G Government Science Officer ('officer') confirmed the same. The respondent was charged at the Magistrate's Court, for consuming drugs, an offence under s. 15 of the Dangerous Drugs Act 1952 ('Act'). At the conclusion of the prosecution's case, the respondent was acquitted and discharged without being called to enter his defence, on the grounds that: (i) only one bottle was
H used to collect the urine sample, contrary to the Inspector General's Standing Orders ('IGSO'); (ii) the urine sample was contaminated by the dipping of the test strips; and (iii) non-compliance with s. 31A(1A) of the Act. Dissatisfied, the appellant ('prosecution') appealed to the High Court and the High Court Judge ('HCJ') held that the Magistrate erred in acquitting the
I respondent on grounds (i) and (ii). However, the HCJ found ground (iii) entitled the respondent to an acquittal as the following conditions were not satisfied (i) a police officer not below the rank of sergeant may require an arrested person to furnish a urine sample only if the medical officer 'made

a determination' that it was not practicable for him, or the person assisting him, to obtain the sample within a reasonable period; and (ii) the police officer in question must show proof that such medical officer had informed him that it was not practicable for him to do so. Consequently, the prosecution's appeal was dismissed. Hence, the present appeal by the prosecution.

Held (allowing appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Section 31A(1) of the Act was inserted in 1983 *via* Dangerous Drugs (Amendment) Act 1983 (Act A553) as s. 31A. The provision was subsequently amended in 2002 *via* Act 1167 by the addition of two new sub-sections of which sub-s. (1A) was one. The original s. 31A, which is now sub-s. 31A(1), provides for a medical examination of person who is reasonably suspected of having committed an offence against the Act. Section 31A(1A) which was added as a subsection in 2002, appears to target drug addicts specifically. The Parliamentary Secretary who tabled the Bill in Parliament, in his speech, said that the main aim of s. 31A(1A) provision was to preserve evidence as it may not be practicable for a medical officer to procure a urine sample from an arrested suspect. The aim of s. 31A(1A) was also stated in the opening words of the provision, *ie* 'For the purpose of preservation of evidence …'. These words are the key to interpreting this provision. Otherwise, the intention of Parliament in enacting the provision to preserve evidence in the face of the exigencies faced by enforcement authorities while carrying out operations against drug addicts would be defeated. (paras 8-9)

(2) The HCJ's reading of the provision was not warranted by the words of s. 31A(1A) of the Act. If the police are obligated to wait for the determination of the medical officer, precious time would be wasted and it is possible that traces of drugs in the body of a suspect would have disappeared by the time the urine sample is obtained. Section 31A(1A) of the Act does not impose the duty to 'prove' that it was not practicable to send the suspect to the hospital for the medical officer to obtain the urine sample. It is a provision designed to preserve evidence depending on constraints of the situation faced by the enforcement authorities. Therefore, the test result from a urine sample is not rendered inadmissible merely because the police could not prove that sending the suspect to see a medical officer to take a urine sample is not practicable. The determination whether it is practicable to send a suspect to see a medical officer must be made by the police officers on the ground who must have regard to relevant circumstances with the overarching aim of preserving the evidence. (paras 10, 11 & 14)

(3) The Magistrate held that it was fatal that only one bottle of urine sample was collected by the police in contravention of the IGSO. By the time the High Court heard the appeal, the decision of this court in *PP lwn. Rosman Saprey & Satu Lagi Rayuan* ('*Rosman Saprey*') was pronounced. The Court of Appeal panel in *Rosman Saprey* held that the IGSO that provided that two bottles of urine specimen must be collected had no force of law. It was a departure from the decision of another panel of the Court of Appeal, namely, *Noor Shariful Rizal Noor Zawawi v PP*. The HCJ preferred to follow the later decision of *Rosman Saprey* and there was no reason to disturb his decision on this. (para 16)

(4) It was argued before the Magistrate that the dipping of the test strips for the purpose of preliminary tests into the single bottle of urine could have somehow contaminated the sample to the extent that the integrity of the final test result obtained by the officer was open to question. The HCJ correctly overruled the Magistrate on this point. The officer never said that the urine sample was contaminated by the test strips that were dipped into it despite the cross-examination questions put to him on this point. All the questions were purely speculative questions without any foundation. (para 17)

(5) The findings of the Magistrate's Court and the High Court, in respect of the issue of non-compliance with s. 31A(1) and (1A) of the Act, were reversed. The prosecution had established a *prima facie* case and the respondent was ordered to enter his defence upon the charge. (para 18)

Case(s) referred to:

Choo Kah Chong lwn. PP [2019] 1 LNS 13 HC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Noor Shariful Rizal Noor Zawawi v. PP [2017] 4 CLJ 434 CA ***(refd)***
PP v. Mohamad Rasid Jusoh [2009] 9 CLJ 557 HC ***(refd)***
PP lwn. Mohd Safwan Husain [2017] 7 CLJ 685 CA ***(refd)***
PP lwn. Rosman Saprey & Satu Lagi Rayuan [2019] 4 CLJ 767 CA ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 15, 31A(1A), First Schedule

For the appellant - Nik Suhaimi Nik Sulaiman, Umar Saifuddin Jaafar, Faizah Mohd Salleh; DPP
For the respondent - V Santhiran; M/s Charanjit, V Santhiran & Partners

[Editor's note: For the High Court judgment, please see PP v. Samsul Arifin Bakar [2019] 2 CLJ 692 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] The respondent was charged with the offence of consuming drugs which is an offence under s. 15 of the Dangerous Drugs Act 1952. He was acquitted and discharged at the end of the case for the prosecution without being called to enter his defence. The decision of the learned Magistrate was affirmed by the High Court. The Public Prosecutor has now appealed against the said decision. The ground of acquittal pertains to the manner in which the urine sample was collected from the respondent.

Brief Facts

[2] Before we embark upon a discussion of the legal issues that arises in this appeal, we shall first set out the background facts. The respondent was arrested on 31 March 2017 at 7.40pm at his house and was brought to the Teluk Intan Police Station. At the Police Station, the urine sample of the respondent was collected on the orders of ASP Ismail Rosdi. The collection of the sample was supervised by Insp Ahmad Saifulbahri. Only one bottle was used for the said purpose. The preliminary test conducted at the police station by Insp Ahmad Saifulbahri by dipping test strips into the urine sample showed the presence of amphetamine and methamphetamine. Subsequent analysis by a Government Science Officer at the Kuala Lumpur General Hospital confirmed that the urine sample contained amphetamine and methamphetamine which are listed as dangerous drugs in the First Schedule of the Dangerous Drugs Act 1952.

Findings Of Magistrate

[3] The learned Magistrate acquitted the respondent on three grounds which all are in respect of the collection of the urine sample. The said grounds are:

(i) only one bottle was used to collect the urine sample which is contrary to the Inspector General's Standing Orders ("IGSO");

(ii) the urine samples were contaminated by the dipping of the test strips;

(iii) non-compliance with s. 31A(1A) of Dangerous Drugs Act 1952.

Findings Of The High Court

[4] The learned High Court Judge held that the learned Magistrate erred in acquitting the respondent on grounds (a) and (b). However, the learned High Court Judge found that the Magistrate correctly held that there was non-compliance with s. 31A(1A) on facts of this case and such non-compliance entitled the respondent to an acquittal. Consequently, the appeal of the prosecution was dismissed. This is the main issue in this appeal and we shall address it below.

A **Whether There Was Non-compliance With Section 31A(1A)**

[5] For ease of reference we reproduce below the entire s. 31A(1) and (1A):

> 31A. Examination of arrested person by a medical officer
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> B (1) When any person is arrested on a charge of committing an offence against this Act:
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> (a) which is of such a nature; or
>
> (b) which is alleged to have been committed under such circumstances,
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> C as give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any other officer in charge of a police station, or any officer of customs, and for any person acting in aid of a medical officer and under his direction, to make such an
> D examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which may afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.
>
> (1A) For the purpose of preservation of evidence, it shall be lawful for a
> E police officer not below the rank of sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.

F **[6]** The learned High Court Judge held that s. 31A(1A) is "subservient" to the "main provision" of s. 31A(1). However, we pause to observe that ss. 31A(1) and 31A(1A) are both subsections of s. 31A. Section 31A(1) is therefore not a "main provision". Furthermore, it is not provided that s. 31A(1A) is "subject to" s. 31A(1). Nonetheless there is a link between the
G two subsections. The urine sample to be collected under sub-s. 1A is for the purpose of medical examination referred to in sub-s. (1). The learned High Court Judge reasoned that a police officer not below the rank of sergeant may require an arrested person to furnish a urine sample only if the medical officer "made a determination" that it is not practicable for him or the person
H who is assisting him to obtain the said sample within a reasonable period. The learned High Court Judge further opined that the police officer in question must show proof that he had taken steps to request the medical officer to take samples and must show proof that such medical officer had informed him that it is not practicable for him do so. Premised on the
I argument that in the instant case, the said conditions were not satisfied, the learned High Court Judge upheld the acquittal of the respondent and dismissed the appeal of the Public Prosecutor.

[7] Learned counsel for the respondent argued that it is incumbent on the prosecution to prove that it was not "practicable" for a medical officer to collect the urine sample and that such failure is fatal.

[8] Our view on s. 31A(1) and s. 31A(1A) is as follows. Section 31A(1) was inserted in 1983 *via* Dangerous Drugs (Amendment) Act 1983 (Act A553) as s. 31A. The provision was subsequently amended in 2002 *via* Act 1167 by the addition of two new sub-sections of which sub-s. 1A is one. The original s. 31A which is now sub-s. 31A(1) provides for a medical examination of person who is reasonably suspected of having committed an offence against the Act. We should think that it is not necessarily limited to analysing the urine sample of a suspect. Thus, suspects who had swallowed dangerous drugs to use their body as a container could be medically examined under this section.

[9] Section 31A(1A) which was added as a sub-section in 2002 appears to target drug addicts specifically. As pointed out by the learned Deputy Public Prosecutor, the Parliamentary Secretary who tabled the Bill in Parliament said in his speech that the main aim of s. 31A(1A) provision is to preserve evidence as it may not be practicable for a medical officer to procure a urine sample from an arrested suspect. The aim of s. 31A(1A) is also stated in the opening words of the provision, ie, "for the purpose of preservation of evidence …" To our mind, these words are the key to interpreting this provision. Otherwise, the intention of Parliament in enacting the provision to preserve evidence in the face of the exigencies faced by enforcement authorities while carrying out operations against drug addicts would be defeated.

[10] The learned High Court Judge opined that several pre-conditions must be satisfied before a urine sample can be taken by a police officer not below the rank of sergeant. His Lordship said that the police must prove in court that it was not practicable for a medical officer to obtain the urine sample from the arrested person. His Lordship also said that the determination whether the procurement of the urine sample by a medical officer is practicable must be made by the medical officer himself. In our view, such a reading of the provision is not warranted by the words of s. 31A(1A). If the police are obligated to wait for the determination of the medical officer, precious time would be wasted and it is possible that traces of drugs in the body of a suspect would have disappeared by the time the urine sample is obtained.

[11] In respect of the argument that the police have to "prove" that it was not practicable to send the suspect to the hospital for the medical officer to obtain the urine sample, we note that s. 31A(1A) does not impose that duty. It is a provision designed to preserve evidence depending on constraints of the situation faced by the enforcement authorities. Therefore, the test result from a urine sample is not rendered inadmissible merely because the police could not prove that sending the suspect to see a medical officer to take a urine sample is not practicable.

[12] We find analogical support for this view in the judgment of this court in *PP lwn. Mohd Safwan Husain* [2017] 7 CLJ 685; [2017] 5 MLJ 255 which was cited by the learned DPP. In that case which also involved the collection of urine sample under s. 31A(1A) of the Dangerous Drugs Act 1952, the respondent was acquitted on the ground that prosecution failed to prove that he was an "arrested person" which appears to be a pre-condition of s. 31A(1). The Court of Appeal reversed the decision of the High Court and the Magistrate's Court and said as follows:

> Harus juga dicatat lanjut bahawa s. 31A ADB 1952 tidak menyebut di mana-mana bahawa kegagalan untuk mematuhi kehendak di situ boleh membuatkan apa jua bukti yang diperoleh hasil daripada pemeriksaan yang dilakukan akan menjadi tidak boleh diterima sebagai keterangan (inadmissible). Ini berbeza dengan peruntukan s. 113 KPJ atau pun s. 37A ADB 1952 yang memperuntukkan dengan jelas bahawa percakapan tertuduh selepas ditangkap dan tanpa diberikan kata-kata amaran tidak boleh diterima sebagai keterangan (inadmissible). Seperti mana yang dinyatakan di atas berkenaan dengan objektif s. 31A, seksyen ini memberikan keabsahan undang-undang (lawfulness) ke atas tindakan yang dilakukan oleh pegawai-pegawai atau orang yang disenaraikan dalam mengambil sampel dan membuat pemeriksaan ke atas orang yang ditangkap. Pada pandangan kami itulah dasar utama peruntukan s. 31A ini. Pada pengamatan kami lagi, skema peruntukan tersebut jelas membezakan antara pemberian kebenaran *vis a vis* kesahan dengan kerelevanan sesuatu bahan bukti yang diperoleh daripada tindakan tersebut. Ini dapat dilihat daripada perkataan dan ungkapan yang digunakan dalam s. 31A(1A) itu sendiri iaitu 'For the purpose of preservation of evidence ...'.

[13] Similarly, in the instant case, even if there was a failure on the part of the prosecution to prove that it was not practicable to send the respondent to see a medical officer for the purpose of obtaining the urine sample, we shall respectfully follow the principle enunciated in the above-mentioned case and hold that the test result in question is admissible.

[14] It is also our view that the determination whether it is practicable to send a suspect to see a medical officer must be made by the police officers on the ground who must have regard to relevant circumstances with the overarching aim of preserving the evidence. We have reviewed two High Court cases that discussed the issue at hand, namely *PP v. Mohamad Rasid Jusoh* [2009] 9 CLJ 557 and *Choo Kah Chong lwn. PP* [2019] 1 LNS 13. In both cases, it was held that the distance from the hospital and the point of arrest or the police station alone is not the determinative factor in deciding whether it is "practicable" for the suspect to be brought to see a medical officer. In the latter case, the High Court said as follows:

> Perayu kes semasa, ketika ujian saringan awal hendak dibuat, dia tidak berada di hospital. Dia berada di Balai Polis Sungai Siput Utara. Mahkamah ini bersetuju dengan hujahan TPR, demi mengambil segera sampel air kencing Perayu bagi tujuan dianalisa oleh pegawai sains sebelum kesan dadah hilang daripada air kencing Perayu, adalah tidak praktikal untuk SP2 membawa Perayu ke fasiliti perubatan kerajaan bagi tujuan diambil sampel air kencing. Meskipun jarak perjalanan ke fasiliti perubatan kerajaan itu hanya mengambil masa 10 minit sahaja, faktor lain perlu diambil kira seperti keutamaan mendapat sampel seberapa segera bagi menjaga keutuhan sampel yang diberikan, pengangkutan, eskot, dan aspek keselamatan yang lain. Pada hemat Mahkamah ini, pihak polis sebagai agensi yang melakukan penyiasatan lebih berupayaan (knows best) untuk menentukan sama ada praktikal atau tidak untuk menghantar suspek yang disyaki memasukkan atau menggunakan dadah ke dalam badan ke hospital bagi tujuan pengambilan air kencing. Sementelah pula, pengambilan sampel air kencing tidak memerlukan sebarang kepakaran khusus. Yang penting ialah pelabelan yang sempurna pada botol sampel yang berisi air kencing suspek supaya tidak bertukar dengan sampel air kencing suspek yang lain dan memastikan tiada kacau ganggu ke atas sampel tersebut bermula daripada masa sampel diambil sehingga selesai dianalisa oleh pegawai sains.

[15] We are in agreement with the observations of the learned Judicial Commissioner in the above quoted passage. Coming back to the instant case, the only reason that the decision of the Magistrate was affirmed by the High Court was because the police failed to prove that it was not practicable for the respondent to be taken to see a medical officer for the purpose of taking his urine sample. Having regard to our view that such failure is not fatal, the decision of the Magistrate and High Court cannot stand. However, before we conclude this judgment, for sake of completeness we shall address other issues that were raised in the Magistrate's Court in the instant case.

Other Issues

[16] The learned Magistrate held that it was fatal that only one bottle of urine sample was collected by the police in contravention of the IGSO. By the time the High Court heard the appeal, the decision of this court in *PP lwn. Rosman Saprey & Satu Lagi Rayuan* [2019] 4 CLJ 767 was pronounced. The Court of Appeal panel in the above-mentioned case held that the IGSO that provided that two bottles of urine specimen must be collected has no force of law. It was a departure from the decision of another panel of the Court of Appeal, namely, *Noor Shariful Rizal Noor Zawawi v. PP* [2017] 4 CLJ 434. The learned High Court Judge preferred to follow the later decision of *PP v. Rosman Saprey & Satu Lagi Rayuan* (*supra*). We see no reason to disturb his decision on this point as it is based on the principles stated in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1.

[17] It was also strenuously argued before the learned Magistrate that the dipping of the test strips for the purpose of preliminary tests into the single bottle of urine could have somehow contaminated the sample to the extent that the integrity of the final test result obtained by the Government Science Officer was open to question. We find that the learned High Court Judge correctly overruled the Magistrate on this point. We note that the Government Science Officer never said that the urine sample was contaminated by the test strips that were dipped into it despite the cross-examination questions put to him on this point. All the questions were purely speculative questions without any foundation. Assuming there was foundation to the said questions, the defence can call their own expert since the Government Science Officer did not assist their case. Therefore, we are in agreement with the learned High Court Judge on this issue.

Conclusion

[18] As we have reversed the finding of the Magistrate's Court and the High Court in respect of the issue of non-compliance with s. 31A(1) and (1A), it must necessarily follow that the prosecution has established a *prima facie* case. In the premises, we allow the appeal and set aside the order of the Magistrate's Court and the High Court and in its place substitute an order that the respondent be called to enter his defence upon the said charge.